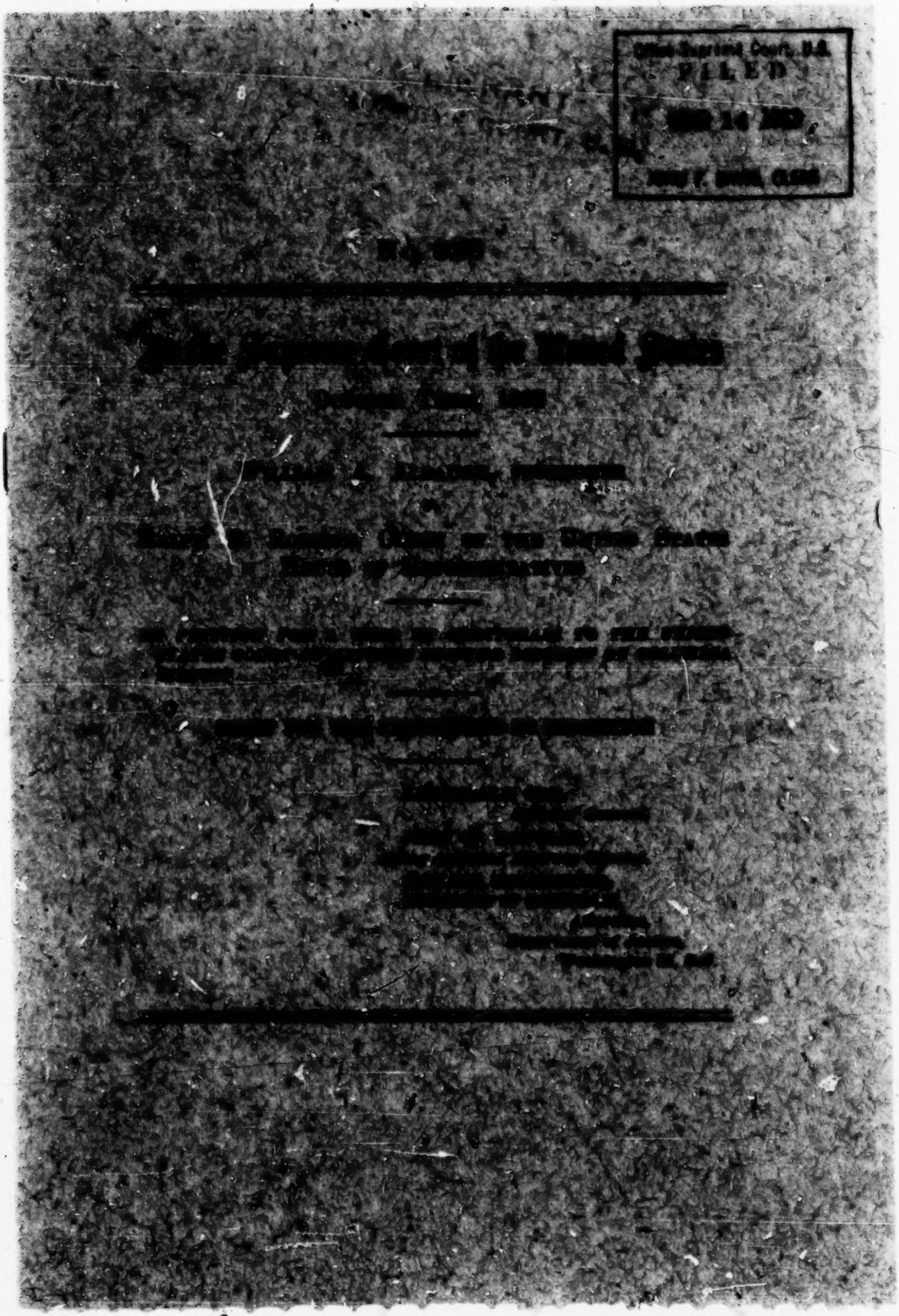

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 826

WILLIAM A. ALBAUGH, PETITIONER

v.

RALPH R. ROBERTS, CLERK OF THE UNITED STATES HOUSE OF REPRESENTATIVES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Neither the district court in dismissing petitioner's complaint (R. 11) [1] nor the court of appeals in dismissing the appeal (Pet. App. 3a), rendered any opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1963 (Pet. App. 3a). The petition for a writ of certiorari was filed on February 14, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

[1] Record references are to the printed joint appendix, which constituted the record in the court of appeals and was filed by petitioner in this Court pursuant to Rule 21.

QUESTIONS PRESENTED

1. Whether a citizen of the State of Maryland has standing to complain that the population of the District of Columbia was not counted in apportioning United States Representatives to Maryland.

2. Whether the District of Columbia is a "State" for purposes of apportioning Representatives among the States.

CONSTITUTION AND STATUTES INVOLVED

Article I, Section 2 of the Constitution and 2 U.S.C. 2a are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

Petitioner, a citizen of Maryland,[2] filed this action against respondent, the Clerk of the United States House of Representatives,[3] on May 1, 1962 (R. 2). Respondent, acting pursuant to 2 U.S.C. 2a(b), had certified to the Governor of Maryland that his State was entitled to eight United States Representatives (R. 6), based upon the population within its borders, as reported in the Apportionment Statement submitted to Congress by the President in accordance with 2 U.S.C. 2a(a) (R. 4–5). Petitioner sought to compel the Clerk to change his certification to show that Maryland is entitled to an additional Represent-

[2] Petitioner styles himself as a "Maryland Congressman-at-large Candidate" (Br. pp. 1, 2, 3, 4, 5). More accurately, he unsuccessfully sought the Democratic nomination for that office. He was defeated for the nomination by Carlton R. Sickles, who was later elected and is now serving as United States Representative-at-large from Maryland to the 88th Congress.

[3] The United States Attorney and the Department of Justice acted as counsel for respondent pursuant to 2 U.S.C. 118.

ative. Petitioner's theory is that the District of Columbia is still part of Maryland for purposes of allocating representation in the House; and that Maryland is entitled to an additional representative, based on the combined populations of that State and the District of Columbia.

The district court dismissed the complaint (R. 11), and the court of appeals, after receiving briefs and hearing oral argument, dismissed petitioner's appeal (Pet. App. 3a). Although the court of appeals rendered no opinion, it cited in its order of dismissal an earlier unreported decision involving petitioner, *Albaugh* v. *Mueller*, C.A.D.C., No. 14,456, decided February 19, 1960. There the court had dismissed an earlier appeal by petitioner from a district court dismissal of an action against the Secretary of Commerce seeking the identical relief he now seeks in his suit against the Clerk of the House of Representatives.

ARGUMENT

I. PETITIONER, A MARYLAND CITIZEN, HAS NO STANDING TO ASSERT THE RIGHTS OF DISTRICT OF COLUMBIA CITIZENS TO REPRESENTATION IN THE HOUSE OF REPRESENTATIVES

Petitioner is a resident and citizen of Maryland, which was alloted eight members in the United States House of Representatives. The representation thus accorded Maryland was based on the standards provided in 2 U.S.C. 2a(a), and was computed in accordance with the 1960 census figures "showing the whole number of persons in [that] State, excluding Indians not taxed" (R. 4–5). Petitioner's complaint is not

that the persons residing within Maryland received less than their proper representation in the House, but that the residents of the District of Columbia should have been included in determining Maryland's allotment of Congressmen, and that, if they had been so included, Maryland and the District of Columbia together would have been entitled to an additional Representative. Petitioner is thus in effect attempting to litigate the right of residents of the District of Columbia to elect a Representative to Congress.

Petitioner has standing to assert only his own constitutional rights. *Tileston* v. *Ullman*, 318 U.S. 44; *McGowan* v. *Maryland*, 366 U.S. 420. As the citizens of Maryland, including petitioner, were clearly accorded full representation in the House for themselves, the courts below properly dismissed petitioner's attempts to litigate the rights of the citizens of the District of Columbia to such representation.

2. THE RESPONDENT PROPERLY CERTIFIED THE NUMBER OF REPRESENTATIVES TO WHICH MARYLAND IS ENTITLED ON THE BASIS OF THE POPULATION OF THAT STATE, WITHOUT CONSIDERING THE POPULATION OF THE DISTRICT OF COLUMBIA

While we believe that petitioner's suit was properly dismissed for lack of standing, and that this nonconstitutional ground is an adequate one for denying certiorari, *Alma Motor Co.* v. *Timken*, 329 U.S. 129; *Burton* v. *United States*, 196 U.S. 283, it is also clear that on the merits petitioner's allegations are without substance.

The Constitution, Article I, Section 2, provides that "Representatives * * * shall be apportioned among

the several States which may be included within this Union, according to their respective [populations]." Congress has provided the mechanics of apportionment of Representatives in 2 U.S.C. 2a, 46 Stat. 26, as amended. The pertinent part of this statute provides:

> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.
>
> (b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section.
>
> * * *

As directed by that statute, on January 10, 1961, President Eisenhower transmitted to the 87th Con-

gress the required statement showing the population of each State as ascertained in the 1960 census and, based thereon, the proportional allocation of Representatives among the several States. House Doc. No. 46, 87th Cong., 1st Sess., January 12, 1961 (R. 4–5). In the President's statement no Representatives were allocated to the District of Columbia; Maryland was shown as entitled to eight Representatives, based solely on the population within its borders. Under 2 U.S.C. 2a(b), each State was entitled to the number of Representatives shown in the President's statement. Respondent's sole duty as Clerk of the House was to make a formal certification to each State governor of the number of Representatives to which his State was entitled, as shown in the President's statement. This duty respondent accurately and properly performed (R. 5, 6–7).

Although 2 U.S.C. 2a imposes upon the Clerk of the House the ministerial "duty * * * to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section," petitioner seeks to have the Clerk, in disregard of that duty, award another Representative to Maryland. Petitioner is thus not really challenging the actions of the Clerk in the performance of his duties. Rather, he attacks the congressional decision, embodied in 2 U.S.C. 2a and supported by a century and a half of practice, that the District of Columbia is not a "State" as that term is used in the Constitutional provisions dealing with representation in Congress.

This attack is without merit.[4] The Constitution itself authorized the cession of territory by a State to the federal government to serve as the nation's capital.[5] The area which now comprises the District of Columbia was duly ceded to the federal government by Maryland,[6] which cession Congress accepted.[7] Chief Justice Marshall pointed out in the early case of *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445, that, as the word is used in the Constitution, the District of Columbia is not a "State" for purposes of representation in the national legislature. As recently as 1949, seven members of this Court expressly declined to overrule Justice Marshall's conclusion that the District is not a State for constitutional purposes. *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582. And, of course, all of petitioner's contentions contravene the constitutional basis of the recently adopted Twenty-third Amendment which plainly assumed that the District of Columbia is not a "State" for purposes of determining representation. It provides:

> SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress *to which the District would be entitled if it were a State,*

[4] Const., Art. I, Sec. 8.

[5] Maryland Laws of 1788, ch. 46; 1791, ch. 45; 1792, ch. 49; and 1793, ch. 58.

[6] 1 Stat. 130, ch. 28; 1 Stat. 214, ch. 17.

but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

SEC. 2. The Congress shall have power to enforce this article by appropriate legislation. [Emphasis supplied.]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Acting Assistant Attorney General.

MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

MARCH 1963.

APPENDIX

Article I, Section 2 of the Constitution provides:

> SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No Person shall be a Representative who shall not have attained to the age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight,

Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

2 U.S.C. 2a, 46 Stat. 26, as amended, provides:

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at

Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

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